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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1920

ANGELO RUGGIERO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Three questions are presented on this appeal from a conviction for stealing an interstate cargo of freight:

(1) Whether the Third Circuit violated due process principles in ignoring the issues decided by the trial court and affirming the conviction on a ground rejected by the trial court;

(2) Whether the trial court effected an unconstitutional amendment of the indictment by resting conviction on an element of the crime not alleged by the grand jury;

(3) Whether the prosecution was barred under the Fifth Amendment because of outrageous conduct by a government agent.

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The petitioner, Angelo Ruggiero, respectfully requests that a writ of certiorari issue to review the judgment order, entered on February 20, 1974, by the United States Court of Appeals for the Third Circuit in this proceeding.

OPINIONS BELOW

The judgment order of the Third Circuit, reprinted in the appendix hereto (p. 1a. *infra*), is reported at 492 F.2d 1239, sub nom. *United States* v. *Farley.*

The memorandum opinion and order of the United States District Court for the Middle District of Pennsylvania, reprinted in the appendix hereto (p. 3a, *infra*), has not yet been reported.

JURISDICTION

Following a non-jury trial, petitioner was found guilty on December 17, 1972, by the District Court of the theft of goods from a shipment of freight in interstate commerce, in violation of 18 U.S.C. § 659 and § 2. The District Court overruled certain post-trial motions on May 15, 1973, issuing the memorandum opinion that appears in the appendix hereto. The District Court's final judgment and commitment were entered on July 26, 1973.

On February 20, 1974, the Third Circuit issued its judgment order affirming the conviction. On March 21, 1974, the Third Circuit granted leave to file a petition for rehearing out of time, allowing 20 additional days from March 21 for such a filing. The petition for rehearing was duly filed within the period specified by the Third Circuit. And on April 24, 1974, the Third Circuit denied the petition for rehearing on its merits. See p. 2a, *infra*.

On timely application, Mr. Justice Brennan on May 13, 1974, signed an order extending the time for filing this petition to and including June 22, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal appellate court, consistently with the principles of constitutional due process and of proper administration of criminal justice, can review a federal criminal conviction by ignoring the issues determined in the trial court and by affirming the conviction on a ground rejected by the trial court, sitting without a jury.

2. Whether an unconstitutional amendment of an indictment was effected by the action of a federal trial court in (a) finding that the Government had failed to prove that an interstate cargo had been stolen from a "station" in violation of 18 U.S.C. § 659, as alleged by the grand jury, and (b) resting conviction on proof that the cargo had been stolen from a "motortruck" in violation of 18 U.S.C. § 659, which had not been alleged by the grand jury.

3. Whether a federal prosecution should be barred under the Fifth Amendment, or whether the defense of entrapment should be allowed, where (a) a government informer plays a more than passive role in the commission of the crime, directing, planning and helping execute the crime, (b) the defendant has denied his guilt, and (c) the defendant has not been shown to have played an active role with the other co-defendants participating with the informer in the commission of the offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

United States Code, Title 18, § 659:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house,

platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; . . .

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

Petitioner, Angelo Ruggiero, and three others—Farley, Flammia and Rini—were indicted on a charge of the theft of goods from a shipment of freight in interstate commerce, in violation of 18 U.S.C. § 659 and § 2. In pertinent part, the single-count indictment alleged:

"That on or about the 21st day of June, 1971, at North Lebanon Township, Lebanon County, Commonwealth of Pennsylvania, . . . Angelo Ruggiero did knowingly, wilfully and unlawfully and with intent to convert to their own use, steal, take and carry away *from a station, station house and depot,* chattels of a value in excess of $100.00, that is 1426 cases of foodstuffs, which were moving as, and constituted an interstate shipment of freight . . ." [Emphasis added.]

On December 15, 1972, the District Court, sitting without a jury, adjudged petitioner guilty of this charge, and he was subsequently sentenced to five years imprisonment. The Third Circuit, on February 12, 1974, affirmed the District Court's judgment and commitment.

A. The Various Shifts in the Alleged Crime

Section 659 of Title 18 makes it unlawful to steal or carry away an interstate shipment of freight from, *inter alia,* (1) "any railroad car, wagon, motortruck, or other vehicle," or (2) "any station, station house, platform or depot." In this case, the grand jury charged only that the petitioner and his co-defendants had stolen the freight shipment "from a station, station house and depot." The indictment did not charge that the shipment had been stolen from a "motortruck, or other vehicle."

Petitioner's trial and conviction by the District Court were premised on the grand jury's allegation that the theft had been "from a station, station house and depot." But in the course of the District Court's memorandum opinion denying various post-trial motions filed by petitioner, the District Court found that the evidence produced by the Government had not established that the theft occurred from a station, station house or depot. See p. 6a, *infra.*

The District Court simultaneously found that the evidence did show that "an unlawful taking from a 'motortruck' occurred." See p. 8a, *infra.* There was thus found a variance between the grand jury's charge respecting a "station" and the Governments proof at trial respecting a "motortruck." The District Court, however, labelled the variance a harmless error, and denied petitioner's claim that there had been an unconstitutional constructive amendment to the indictment.

The evidence giving rise to this variance showed that an interstate shipment of spaghetti sauce had been con-

tained within the trailer of a motortruck, en route from Delaware to New York. The truck was left parked on a private lot (owned by Lesher's Mack Truck Sales and Service Co.) for a weekend in Lebanon, Pennsylvania, while the driver visited at his home near Lebanon. The owner of the shipment and the employer of the driver, Gioia Specialty Foods, Inc., was not shown to have known that the truck would be parked on that particular private lot; nor had it authorized the driver to park there. And there was no evidence that Gioia Specialty Foods had made any prior arrangement with the private lot owner to utilize the lot to park its trucks. The lot owner simpy permitted parking on the lot as an accommodation to various truck drivers stopping at Lebanon en route to other destinations.

The theft occurred on a Sunday evening on the weekend in question. The trailer and its contents were removed from the private lot by two of petitioner's co-defendants. Those two co-defendants had proceeded for about two miles before they were stopped and arrested. The goods were not removed from the truck at any point. The petitioner played no role in removing the truck from the private lot; his alleged relationship to the crime was that of an aider and abettor.

These facts led the District Court to conclude that the private parking lot was not a "station" or "station house" as those terms are used in § 659. See pp. 7a-8a, *infra*. The court accordingly rejected the Government's contention that a truck is "stationed" wherever it is parked, and that any place that the driver might have parked this truck during the weekend interlude constituted an interstate facility or "station." To be such a facility or station, said the court, the facility "at the

least must be owned, leased or authorized by the firm engaged in transportation in interstate commerce and used in the normal course of its business." See p. 8a, *infra*.

Petitioner's conviction was thus reaffirmed by the District Court on the new theory that the proof showed that the theft occurred from a "motortruck" rather than from a "station," the variance being deemed immaterial. But on the appeal, the Third Circuit rejected the District Court's new theory of the crime. In footnote 3 of its judgment order, the Third Circuit without elaboration stated: "We believe that it is not an unreasonable construction to conclude, under the circumstances here, that there was a theft from a 'station.'" See p. 2a, *infra*. Petitioner's conviction was accordingly affirmed on the appeal on a basis rejected by the District Court, the trier of the facts.

B. The Activities of the Government's Informer

The Government's chief witness was one Robert Bush, a conceded informer and an alleged agent provocatur. Bush regarded himself as working with the F.B.I., and because of the information that Bush fed to the F.B.I., all of the actions surrounding the taking of the trailer truck from the parking lot were under the surveillance of F.B.I. agents and other law enforcement men.

Petitioner's alleged involvement in the scheme was at most tangential and highly debatable, the District Court calling it "the subject of a serious factual dispute." See p. 13a, *infra*. That dispute was resolved by the court by disbelieving petitioner's testimony and by crediting the contrary testimony of Bush, the informer. At the

core of this factual dispute was an alleged meeting between petitioner and Bush in a motel on the date of the hijacking, in the midst of the co-defendants' futile efforts to start the parked truck. Bush, despite an initial difficulty in identifying petitioner as the one with whom he spoke, testified that petitioner had there offered him extra money if he would help get the truck started.[1] Petitioner denied that any such conversation took place.

Bush not only helped get the truck started but played a key role in the development and execution of the entire hijacking operation. Bush and the co-defendant Farley had originally met each other in 1970 in New York, at which time Bush agreed to deliver to Farley for hijacking a truckload of Sears batteries consigned to Bush. That theft, as to which Bush had pre-arranged F.B.I. surveillance, did not come off, since Farley did not believe the batteries were marketable. Farley and Bush remained in contact with each other through June of 1971. During that time, according to Bush, Farley repeatedly asked Bush to point out other truckloads of commodities that could be stolen in transit.

At a meeting with the three co-defendants on June 19, 1971, petitioner not being present, Bush told the three that he could point out a truckload of Bulova Acutron watches. On the following day, Bush came to a financial agreement with the co-defendant Flammia. Bush reported all these arrangements to the police, as well as to the truck driver. As Bush knew, the truck contained spaghetti sauce, not Acutron watches. He instructed

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[1] Bush testified that he had never seen or spoken to the petitioner Ruggiero before this motel meeting on June 20, 1971, the date of the hijacking. Bush did not know where petitioner fitted into the hijacking operation.

the driver to leave the truck parked over the weekend at the private lot in Lebanon and to stay away from the truck during that time. The F.B.I. was made fully aware of this plot and knew that Bush had lied to the co-defendants about the contents of the truck.

At another meeting with the three co-defendants, Bush was paid $2,000 by Flammia and was promised more money after the goods were delivered in New York. Bush also received $400 from the F.B.I. shortly after the events in question.

The three co-defendants were unable to start the truck when they arrived at the parking lot, despite Bush's assistance. It was at this point that the contested meeting occurred between Bush and the petitioner. Bush thereupon secured the stealing of another tractor and substituted it for the one which had been attached to the trailer containing the spaghetti sauce. The co-defendants thus were able to drive the truckload away from the parking lot. The F.B.I. agents and local police, who had the entire operation under surveillance, brought the project to an end by stopping and arresting the co-defendants after they had driven the truckload several miles.

The co-defendant Farley testified that the whole project came about at the instance of Bush, who invited Farley to see him because he had something that would take Farley out of his financial difficulties (536a).[2] Farley stated that Bush had offered to point out the truckload of Acutron watches at the June 19 meeting

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[2] The co-defendants Flammi and Rini chose not to testify at the trial. The petitioner and Farley were the only defendants who took the stand.

for $5000 (538a), and that the final arrangement was that Bush was to get $5,000 in advance and a later balance of $95,000 (572a). Each of the three co-defendants (Farley, Rini and Flammia) was to receive $100,000 from the operation (572a). Arrangements were then made to meet the next day at a diner near Lebanon, from which the hijacking party would proceed to the parking lot (541a).

The petitioner Ruggiero was not involved in any of these meetings between Bush and the three co-defendants. Indeed, Farley did not even know the petitioner. Only Rini knew petitioner, and Rini cautioned Farley not to mention anything in front of the petitioner (580a). According to the petitioner, he had met Rini by coincidence in a New York bar and told him that he wanted to go to Pennsylvania to pick up his wife and children, but had no driver's license. Rini told petitioner that he happened to be going to Pennsylvania the next day on business and offered to drive petitioner first to where Rini was going and then to petitioner's destination in the Poconos. (593a). It was petitioner's testimony that he had no knowledge of, or interest in, the hijacking operation, and that his presence near the operation was an innocent coincidence (602a, 608a). Petitioner's account of his presence in Lebanon was found by the District Court to be unworthy of belief (651a).

Based upon the foregoing facts, the claim of entrapment was raised by the petitioner in seeking a judgment of acquittal. That claim was denied by the District Court in its post-trial memorandum opinion (see pp. 18a-24a, *infra*), and that denial was expressly affirmed by the Third Circuit on the appeal. The District Court

premised its denial of the entrapment defense upon the following considerations:

(1) Since petitioner had denied his guilt and his involvement in the crime, it would be inconsistent for him now to contend that he was involved in the criminal enterprise but was impermissibly induced to participate by the overreaching of a government agent. See pp. 18a-19a, *infra*.

(2) Petitioner was here found to face "another serious hurdle" in that "[t]here is nothing in the record indicating the circumstances under which [petitioner] Ruggiero may have become involved in this crime." See p. 21a, *infra*. Nothing indicated that petitioner had any direct contact with the informer Bush before the date of the hijacking or that he was directly induced by the acts or remarks of Bush.[3] In such circumstances, said the court, "it is still unclear whether Ruggiero can raise the defense of entrapment." See p. 22a, *infra*.

(3) But the District Court agreed that the entrapment issue could be raised by petitioner on his motion for judgment of acquittal if the Government's evidence established the existence of entrapment as a matter of law. But on that basis, the District Court could find no entrapment. In reliance on this Court's decision in *United States* v. *Russell*, 411 U.S. 423 (1973), the District Court concluded that none of petitioner's codefendants had been entrapped since they had previously manifested an unsolicited predisposition to steal

[3] The court stated that it "would have to surmise that Farley, Flammia or Rini conveyed Bush's remarks to Ruggiero before we could conclude that Ruggiero might have been indirectly induced by the acts of Bush." See pp. 21a-22a, *infra*.

cargo. Said the court: "The testimony of Bush clearly establishes that the criminal design originated with Ruggiero's co-defendants and not with Bush . . . they were not innocent persons corrupted by the overreaching of governmental agents." See pp. 22a-23a, *infra*. While Bush was found to have played more than a passive role in the commission of the crime, the court rejected any claim that his actions shocked "the universal sense of justice." See p. 24a, *infra*.

(4) Finally, "under the present record it would be incongruous to find that Ruggiero was entrapped without first concluding that his co-defendants were entrapped. If the defense fails as to the latter [as the court so held] it must fall as to the former." See p. 22a, *infra*.

REASONS FOR GRANTING THE WRIT

1. A constitutional due process problem is created by the Third Circuit's action in appraising and affirming the conviction in disregard of the statutory issues as determined by the District Court.

An important ingredient of constitutional due process is a defendant's right to have his conviction appraised on appeal "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 202 (1948). As that principle was applied in *Cole*, a state supreme court was held precluded from affirming convictions as though the defendants had been tried and convicted for having violated § 1 of a state statute, when in fact the defendants had been charged, tried and convicted only for violating § 2 of the same statute.

Here we have somewhat more bizarre fluctuations among the charge, the trial, the conviction and the

affirmance. But the constitutional principle epitomized by *Cole* v. *Arkansas* would seem no less demanding, particularly when translated into a rule of administration of criminal justice in the federal courts.

This petitioner was charged and tried in the District Court on the grand jury's allegation that he engaged in the theft of an interstate cargo only from a "station" or "station house," in violation of 18 U.S.C. § 659. But the District Court, sitting without a jury, found that the Government had not proved that the facility from which the cargo was stolen—which facility is an essential element of the offense—was a "station" or a "station house." Rather, the District Court concluded that the Government's proof showed that the theft occurred from a "motortruck," a facility not mentioned in the indictment. The District Court, while denying that this variance between the charge and the proof was material or constituted an unconstitutional amendment of the indictment, proceeded to rest the petitioner's guilt on the proof that he had stolen the cargo from a "motortruck." In effect, the District Court acquitted the petitioner, for lack of proof by the Government, of the charge that he stole from a "station" or "station house."

Yet the Third Circuit did not appraise the District Court's shift to the "motortruck" theory of guilt, with all of its constitutional problems of variance as frankly discussed by the District Court. The Third Circuit ignored the issues as "determined in the trial court," *Cole* v. *Arkansas, supra,* and expressly rested its affirmance on its own belief—contrary to the District Court's belief on which the conviction rested—"that it is not an unreasonable construction to conclude, under the cir-

cumstances here, that there was a theft from a 'station.' " See p. 2a, fn. 3, *infra.*

Was not petitioner thereby deprived of his constitutional due process right to have his conviction appraised on the appeal in terms of the critical fact issues as determined by the District Court? Does not the *Cole* v. *Arkansas* principle apply to federal appellate courts? Does not the proper administration of federal criminal justice demand that the Third Circuit's action in this regard be reviewed and reversed?

To put one final question in this regard: For what crime does petitioner now stand as convicted, stealing from a "station" or stealing from a "motortruck"?

2. Resting petitioner's conviction on the proof that he stole cargo from a "motortruck" is in direct conflict with this Court's decisions respecting the constitutional invalidity of amending a grand jury indictment.

To the extent that the District Court's determination of guilt respecting the taking from a "motortruck" can survive the Third Circuit's improper review and revision of the conviction, that determination comes squarely into conflict with two controlling decisions of this Court: *Ex parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960). See also *Russell* v. *United States,* 369 U.S. 749, 770-771 (1962).

Bain held that a trial court cannot, consistent with the Fifth Amendment, formally and literally strike an essential portion of the indictment as returned by the grand jury.[4] *Stirone* held that a court can neither

[4] In *Bain,* the trial court had struck out the words "Comptroller of the Currency and" from the language of the indictment charging the making of false statements "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association."

change nor add to the indictment by way of admission of evidence of an alternative element of the crime that the grand jury has not alleged.[5] And *Stirone* further made it clear, 361 U.S. at 217-218, that:

> "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same . . . While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by the grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error . . . The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

In the instant case, the petitioner was charged by the grand jury with a specific kind of violation of 18 U.S.C. § 659. That section has been described as "a technical one and requires the Government to prove the allegation that the goods were stolen from one of various enumerated places." *United States* v. *Allegrucci* 299 F.2d 811 (3rd Cir. 1962). The designation in the indictment of one of the various facilities or places enum-

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[5] In *Stirone*, the indictment only charged the defendant with having caused the movement of sand in interstate commerce "from outside the State of Pennsylvania into the State of Pennsylvania." The trial court admitted evidence and charged the jury respecting (1) the movement of sand into Pennsylvania from other States *and* (2) the shipment of steel from Pennsylvania into Michigan and Kentucky. Such an introduction of element (2) into the case was held to create not only a variance but an unconstitutional amendment of the indictment.

erated in § 659 is considered to be an essential ingredient of the crime. "Under this statute, it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes." *United States* v. *Manuszak,* 234 F.2d 421, 423 (3rd Cir. 1956).

And so it was of critical importance that the grand jury carefully mentioned only the "station, station house and depot" designations of § 659 in describing the crime ascribed to petitioner. He was not charged with the other federal crimes mentioned in § 659 of stealing cargo from

(1) "any railroad car, wagon, motortruck, or other vehicle," or

(2) "any steamboat, vessel, or wharf," or

(3) "any aircraft, air terminal, airport, aircraft terminal or air navigation facility."

So, when the District Court found that the Government had failed to prove that a "station" was here involved but that petitioner's guilt could rest on the Government's proof that the theft was from a "motortruck," did not the District Court in effect amend the indictment in the *Stirone* sense? How can the grand jury be said to have charged petitioner with having stolen a cargo from a "motortruck," any more than from an "airplane"? And was not petitioner constitutionally entitled to have his guilt assessed solely in terms of having stolen from a "station"?

If this was truly an amendment of the indictment, the *Stirone* decision invalidates the District Court's effort

to brush the matter aside as a mere variance or harmless error. And in the context of a technical statute, carefully defining various interstate facilities to identify the federal nature of the crimes, it would not appear decisive that the facts presented to the grand jury may have embraced a theft both from a "station" and a "motortruck." Indeed, the grand jury's omission of a "motortruck" from the indictment may reflect the grand jury's careful conclusion that the facts did not warrant charging a theft from a "motortruck."

Moreover, even if the petitioner had adequate notice of the crime charged, even if he was not surprised or put in double jeopardy by the evidence as to the two different facilities, petitioner's constitutional right would not appear to be diluted. The essence of that right is not a double jeopardy matter but a protection against being tried and convicted on any allegation other than what is precisely delineated in the grand jury's indictment.

The District Court exhibited great difficulty and concern with this *Stirone* constitutional issue. Its opinion, with which the Third Circuit exhibited no disagreement, demonstrates the continuing problems faced by lower courts in giving effect to the constitutional principle at stake. Many criminal defendants in the federal courts are faced with charges stemming from statutes of a multi-segmented nature, where it is easy for a judge or prosecutor to slide from one statutory clause or section to another. But when the grand jury has been precise in its selection of a statutory clause or phrase, at what point does an unconstitutional amendment arise? Both the lower courts and the countless criminal defendants of the future need and deserve further guidance from this Court.

3. Important problems are here raised, in light of this Court's recent Russell decision, as to the raising of due process claims respecting outrageous conduct by governmental agents.

In *United States* v. *Russell*, 411 U.S. 423, 436 (1973), a majority of this Court reaffirmed the established doctrine that "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." Any determination that the defendant had a predisposition to commit the crime and thus was not an "unwary innocent" is fatal to an entrapment claim.

The Third Circuit has here affirmed the District Court's articulated rejection of petitioner's entrapment claim, mainly on the authority of the *Russell* decision. In so doing, however, the courts below have either misinterpreted the thrust of *Russell* or exposed new and important variations on the *Russell* decision. Review of such matters is most appropriate. To be specific:

(1) The determination by the District Court that the co-defendants were predisposed to commit this hijacking effectively precludes the assertion of the entrapment defense within the contours of the *Russell* decision. But *Russell* also indicated that even where there is such a predisposition the conduct of law enforcement officers may be so outrageous, so shocking to "the universal sense of justice," that the Due Process Clause of the Fifth Amendment would bar prosecution. 411 U.S. at 431-432.

But *Russell* did not attempt to delineate the degree of outrageousness that must be found to warrant condemnation of overzealous government agents. Perhaps that

can be done only on a case-to-case basis. But, without the benefit of any guidelines from this Court, the District Court disposed of the due process claim by (1) conceding that Bush, the informer, "played a more than passive role in the commission of this crime" by disclosing the location of the truck and providing aid in removing the truck and its contents; and (2) concluding that Bush's actions involved no greater degree of governmental involvement than in *Russell* and hence did not shock the universal sense of justice. See p. 24a, *infra*.[6]

That Bush played more than a passive role is an understatement. He actively planned, directed and organized the whole operation, and agreed to share in the spoils. Does not *Russell* contemplate that such actions be evaluated with more than a comparative glance at the facts in *Russell* and by a conclusionary statement that the reviewing court is not shocked? Should there not be a more careful analysis of all the factors? What should be the controlling due process factors? Those are the questions that this case raises and that the courts below have not answered.

(2) Does *Russell* contemplate that such a due process claim cannot be raised by a defendant who had pleaded not guilty? The District Court, viewing the matter solely in terms of raising the entrapment defense, questioned whether such a defense is consistent with a denial of the acts constituting the offense charged. See pp. 18a-19a, *infra*. Even as to the entrapment defense, at least one Circuit has held that the de-

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[6] While this Court did not assess the *Russell* facts in due process terms, those facts arguably, if not clearly, show far less outrageous conduct than Bush exhibited in this case.

fense is not inconsistent with a not guilty plea. *Hansford* v. *United States,* 303 F.2d 219, 221 (D.C. Cir. 1962). But the totally unanswered problem is whether a not guilty plea precludes the due process claim referred to in *Russell.*

(3) Does *Russell* contemplate that the due process claim is to be unavailable to a defendant who plays a minor role, as an aider or abettor, in the commission of the offense? Does the right of such a defendant to raise the claim depend upon the viability of the claim as respects those co-defendants who played major and active roles in the execution of the crime? Here again, the District Court provided affirmative answers to these questions within the framework of the entrapment defense. No answers were provided within the framework of the due process claim.

It would appear that the due process problem mentioned by *Russell,* if it is found to exist in a particular case, would be such as to taint and preclude the entire prosecution by the Government. Outrageous conduct by government agents can go beyond what is commonly known as entrapment and be so shocking as to "absolutely bar the government from invoking judicial processes to obtain a conviction." *Russell,* 411 U.S. at 431-432. Cf. *Rochin* v. *California,* 342 U.S. 165 (1952). If that be true, then, the remoteness of a particular defendant from the particular events constituting the crime would not appear relevant to his right to protest the invocation of any judicial processes to obtain his conviction, whether as a principal or as an aider or abettor.

These are critical and unanswered questions arising from the *Russell* acknowledgement that due process

claims may survive an unwarranted entrapment defense. They deserve consideration and answer by this Court.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 21, 1974

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1729

UNITED STATES OF AMERICA

v.

ROBERT PATRICK FARLEY, PAUL FLAMMIA, WILLIAM RINI, ANGELO RUGGIERO, ANGELO RUGGIERO, *Appellant*

(D. C. Criminal No. 14965)

Appeal from the United States District Court
for the Middle District of Pennsylvania

Argued February 12, 1974

Before VAN DUSEN and ADAMS, *Circuit Judges*,
and HUYETT, *District Judge*

Judgment Order

After considering the contentions raised by appellant that (1) the Government failed to establish an essential element of the offense charged in the indictment, namely, stealing, taking, or carrying away from "a station, station house and depot";[1] (2) appellant was deprived of his Fifth and Sixth Amendment rights in that the district court amended the indictment and appellant was prejudiced by such amendment;[2] (3) the evidence as to appellant was insufficient to warrant the conclusion that he was criminally involved; (4) appellant was the victim of outrageously offensive conduct on the part of the Government and was, therefore, entrapped; and (5) the district court erred in failing to take additional testimony offered by appellant, it is

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[1] See *United States* v. *Bryan*, 483 F. 2d 88, 91-97 (3d Cir. 1973).

[2] *United States* v. *Evans*, 398 F. 2d 159, 166 (3d Cir. 1968).

ADJUDED AND ORDERED that the July 26, 1973, judgment and commitment of the district court be and is hereby affirmed. [3]

Dated: Feb. 20, 1974

By the Court:

/s/ VAN DUSEN
Van Dusen
Circuit Judge

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[3] See *United States* v. *Farley*, Opinion of 5/15/73 (Criminal No. 14965, M. D. Pa.—636a), and Findings of Fact filed 1/23/73 (Document No. 68, Criminal No. 14965, M. D. Pa.—617a). We believe that it is not an unreasonable construction to conclude, under the circumstances here, that there was a theft from a "station."

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of this circuit in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

It is further ordered that appellant's applications for release on bail and to stay the mandate are denied.

By the Court:
VAN DUSEN
Circuit Judge

Dated: April 24, 1974.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 14965

UNITED STATES OF AMERICA

v.

ROBERT PATRICK FARLEY, PAUL FLAMMIA, WILLIAM RINI, ANGELO RUGGIERO

Memorandum Opinion and Order

Before the court are post-trial motions for judgment of acquittal, in arrest of judgment, and in the alternative, for a new trial, filed on behalf of Angelo Ruggiero. On December 15, 1972 this court, sitting without a jury, adjudged the defendant guilty of the theft of goods from a shipment of freight in interstate commerce, in violation of 18 U.S.C. § 659 and § 2.

In support of his motion for judgment of acquittal and in arrest of judgment, the defendant contends (1) the government's evidence is insufficient to sustain the verdict and, coincidentally, that the findings of fact upon which the verdict is based are clearly erroneous; (2) the offense, if any shown by the evidence, is not an offense against the United States because the government failed to establish an essential element of the offense as charged in the indictment; and, (3) the defendant was entrapped. In support of his motion for new trial the defendant contends that the finding of guilty is contrary to the weight of the evidence.

This court, after careful consideration of the contentions raised in the aforementioned motions and briefs filed in support thereof, concludes that the defendant's contentions do not compel the granting of the relief requested.

I. The Government's Failure To Establish An Essential Element of Crime Charged in the Indictment.

The indictment, drawn under 18 U.S.C. § 659 and § 2, charges in pertinent part:

> "That on or about the 21st day of June, 1971, at North Lebanon Township, Lebanon County, Commonwealth of Pennsylvania, . . . Angelo Ruggiero did knowingly, wilfully and unlawfully and with intent to convert to their own use, steal, take and carry away from a station, station house and depot, chattels of a value in excess of $100.00, that is 1426 cases of foodstuffs, which were moving as, and constituted an interstate shipment of freight . . . ." In violation of Title 18 U.S.C. § 659 and § 2.

The defendant contends that the government did not prove that the theft occurred from "a station, station house, or depot" and consequently failed to establish an essential element of the crime charged in the indictment. In support the defendant cites the case of *United States* v. *Manuszak*, 234 F.2d 421 (3d Cir. 1956), in which the Third Circuit Court of Appeals held that it is not a federal crime to steal goods from an interstatement shipment of freight unless the goods are taken from one of the places or facilities specifically enumerated in 18 U.S.C. § 659; to wit, "any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility." In *Manuszak* the court quashed an indictment which did not specifically allege the place or facility from which the goods were stolen.[1]

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[1] The following Third Circuit cases are in accord with the holding in *Manuszak*: *United States* v. *Olivo*, 278 F.2d 415, 417 (3d Cir. 1960); *United States* v. *Allegrucci*, 258 F.2d 70 (3d Cir. 1958); *United States* v. *Cohen*, 274 F. 596 (3d Cir. 1921); *United States* v. *Moynihan*, 258 F. 529 (3d Cir. 1919).

Supporting the decision to quash the indictment in *Manuszak* was the court's conclusion that the language of 18 U.S.C. § 659 was not broad enough to cover all thefts from interstate commerce. Accordingly, it was held that the government must allege and prove that the theft occurred from one of the specifically enumerated facilities. This position is not without support in other circuits.[2] However, a number of courts have taken a different view, reasoning the language of 18 U.S.C. § 659 "evidences a clear purpose to reach depredations affecting any conceivable instrumentality by which the interstate transportation of freight may be accomplished." *Dunson* v. *United States*, 404 F.2d 447, 448-49 (9th Cir. 1968), *cert. denied*, 393 U.S. 1111. These cases hold that the involvement of one interstate freight facilitity rather than another is not an element of the offense.[3]

Although this court is inclined to agree with the reasoning of the latter cases, the Third Circuit's holding in *Manuszak* must be applied in the instant case to the extent relevant to the issues involved herein.

It is the government's position that the situs of the truck at the time of the theft was a "station" or "station house." It would therefore follow that even applying the standards of *Manuszak* the government has established that essential element of the offense as it was charged in the indictment.

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[2] *Wolkoff* v. *United States*, 84 F.2d 17 (6th Cir. 1936), *cf*, *United States* v. *Knight*, 451 F.2d 275 (5th Cir. 1971); *United States* v. *Prujansky*, 415 F.2d 1045 (6th Cir. 1969); *United States* v. *D'Antonio*, 342 F.2d 667 (7th Cir. 1965).

[3] *United States* v. *Spivey*, 448 F.2d 391 (4th Cir. 1971); *Dunson* v. *United States*, 404 F.2d 447 (9th Cir. 1968), *cert. denied*, 393 U.S. 1111; *United States* v. *Wora*, 246 F.2d 283 (2d Cir. 1957); *See also*, *United States* v. *Hampton*, 341 F.Supp. 481 (E.D. Wisc. 1972).

The government's evidence can fairly be said to have established the following facts concerning the location of the goods at the time of the theft. The goods were contained within the trailer of a motor truck which had been parked at Lesher's Mack Truck Sales and Service, in Lebanon, Pennsylvania, by its driver who was en route from Odessa, Delaware, to Buffalo, New York. The driver, who lived near Lebanon, parked the truck at this location on Friday, June 19, 1971, intending to pick up the truck early Monday morning and continue to Buffalo. Although Gioia Specialty Foods, Inc., the driver's employer and owner of the goods, presumably knew that the driver would stop in Lebanon for the weekend there was no evidence indicating that Gioia Foods knew that the truck would be parked at Lesher's Mack Truck Sales and Service or authorized the driver to park there. The driver testified that Lesher's was a common parking area for drivers who temporarily stopped in Lebanon while en route to destinations elsewhere.

The theft occurred during the evening of Sunday, June 21, 1971, when the trailer and its contents were removed from the lot by two of Ruggiero's co-defendants. These defendants proceeded for approximately two miles before they were stopped and arrested. The goods were removed from the trailer.

Upon these facts, the court concludes that Lesher's Mack Truck Sales and Service cannot be considered a "station" or "station house," as those terms must be applied in the context of the language of 18 U.S.C. § 659. The attorney for the government cites the definition of "station" contained in Webster's New International Dictionary, 2d ed., Unabridged:

> "The spot or place where anything stands, especially where a person or thing habitually stands, comes to a stand or is appointed to remain for a time."

The government contends because the driver parked the truck at this location it was a place where the truck was designated to stand and was, therefore, a "station." Although some degree of significance is attached to the customary use of Lesher's as a parking area by other truck drivers, the government asserts that a truck is "stationed" wherever it is parked and, accordingly, any place that the driver would have parked the truck during the weekend of June 19, 1971 would have constituted a "station."

The court cannot agree with this proposition. It is axiomatic that criminal statutes must be strictly construed. While this does not require the court to give the words of the statute the narrowest possible meaning, it does require that the words of the statute be interpreted in accordance with the evident intent of Congress. *E.g., United States* v. *Cook*, 384 U.S. 257 (1966); *United States* v. *Padilla*, 374 F.2d 782 (2d Cir. 1967).

The word "station" was added to the facilities enumerated in the statute on recodification in 1948 (Act of June 25, 1948 c. 645, 62 Stat. 729). However, there is nothing in the act's legislative history indicating Congress attached any degree of significance to the modification. The revisioner's note, found in the 80th Congress House Report, No. 304, refers only to "minor changes" in phraseology. It is, therefore, reasonable to conclude that Congress did not intend to make any change in the substantive content of the existing law. *Cf, United States* v. *Cook, supra*, at 260.

Although § 659 does not attempt to define the facilities enumerated therein, its predecessor, 18 U.S.C. § 409 (1940 ed.) Act of January 28, 1925 c. 102, 43 Stat. 793, contained the following definition:

> "The words . . . station house . . . shall include . . . any station house . . . of any person, firm, association or corporation having in his custody therein or thereon

> any freight, express, goods, chattels, shipments or baggage moving as or which are a part of or which constitute an interstate or foreign shipment."[4]

This definition has been interpreted to require that the facility belong to the person who had custody of the goods. *United States* v. *Werner,* 160 F.2d 438 (2d Cir. 1947). The lot at Lesher's Mack Truck was not the property of Gioia Specialty Foods, Inc., the firm engaged in the interstate transportation of the commodities in question. Gioia Foods did not authorize its driver to park the truck at that location, nor did it arrange with Lesher's Mack Truck to utilize the lot to park its vehicles. While the truck and its contents were parked at Lesher Macks they remained within the custody of the Gioia Foods' driver. Lesher Mack had no control over or responsibility for the vehicle. The fact that Lesher Mack may allow trucks to be parked at its garage as an accommodation to local drivers is of no consequence. Lesher's Mack Truck garage was not an interstate transportation facility. The facility, in the court's opinion, at the least must be owned, leased or authorized by the firm engaged in transportation in interstate commerce and used in the normal course of its business.

The government cautions that to refuse to hold Lesher Mack a facility of interstate commerce is tantamount to depriving small interstate carriers of the protection the statute was intended to afford. However, the court has not held § 659 inapplicable to the facts of the instant case. When the truck and its contents were removed from the parking lot at Lesher Mack an unlawful taking from a "motortruck" occurred, and thus a violation of 18 U.S.C. § 659 was committed. When the defendants removed the trailer from the lot they likewise took control and dominion

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[4] This definition was omitted from 18 U.S.C. § 659 (Act of June 25, 1948 c. 645, 62 Stat. 729) as unnecessary. *See,* 80th Congress House Report No. 304.

over its contents. It was not necessary that the defendants remove the goods from the vehicle.[5] The taking of the truck evidences the intent to convert its contents to the defendants' own use. Therefore the government has proven all three elements of the crime defined in 18 U.S.C. § 659: (1) that the defendants took the foodstuffs with the intent to convert to their own use; (2) that the goods taken were part of an interstate shipment of freight; and, (3) that the theft occurred from a facility enumerated in § 659.

The issue which remains is whether there is now a fatal variance between the allegations contained in the indictment and the government's proof at trial. In the court's judgment the issue is controlled by Rule 52(a) of the Federal Rules of Criminal Procedure which provides:

> "Harmless Error. Any error, defect, irregularity or *variance* which does not affect substantial rights shall be disregarded." (Emphasis added)

Under Rule 52(a) a variance such as the one in the instant case is not fatal unless it has affected substantial rights of the accused.[6] The Supreme Court has held, in *Berger* v. *United States*, 295 U.S. 78, 82 (1934), that two requirements must be met:

> "(1) [T]he accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by

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[5] *United States* v. *Dower*, 472 F.2d 472 (9th Cir. 1973); *United States* v. *Green*, 446 F.2d 1169, 1173 (5th Cir. 1971); *United States* v. *Fusco*, 398 F.2d 32 (7th Cir. 1968); *United States* v. *Padilla*, 374 F.2d 782 (2d Cir. 1967), *cf*, *United States* v. *De Normand*, 149 F.2d 622 (2d Cir. 1945).

[6] See, *United States* v. *Schrenzel*, 462 F.2d 765 (8th Cir. 1972); *United States* v. *Petti*, 459 F.2d 294 (3d Cir. 1972); *Heisler* v. *United States*, 394 F.2d 692 (9th Cir. 1968), *cert. denied*, 393 U.S. 986; *United States* v. *Fassoulis*, 293 F.2d 243 (2d Cir. 1961); *United States* v. *Schwartz*, 150 F.2d 627 (2d Cir. 1945).

the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

Both of these requirements have been met here.

There has never been any question as to the circumstances surrounding the movement of the goods or their location at the time of the theft. The indictment recites the date and place of the offense and sufficiently identifies the criminal act charged. The indictment has given the defendant adequate notice of the crime charged and he cannot be heard to say he was surprised by the evidence offered at trial or misled by the presence of the words "station," "station house" or "platform" in the indictment. The court also finds that the allegations contained in the indictment in regard to the time and place of the offense and description of the goods stolen, are sufficient to protect the deefndant against being put twice in jeopardy for the same offense.[7]

There is a further requirement which must be considered in determining whether the variance in question has affected substantial rights of the accused. A variance may be of such a nature that although meeting the requirements of *Berger* v. *United States, supra,* it is equivalent to a constructive amendment to the indictment.

The fifth amendment prohibits the government from trying a defendant on charges that are not made in the indictment against him.[8] Accordingly, it has been held that any

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[7] Even if the indictment itself was not sufficient for purposes of double jeopardy, resort to the transcript of the trial would disclose the exact crime for which the defendant was tried. *Russell* v. *United States,* 369 U.S. 749, 764 (1962).

[8] *Stirone* v. *United States,* 361 U.S. 212, 216 (1960); *Ex Parte Bain,* 121 U.S. 1 (1887); *United States* v. *De Cavalcante,* 440 F.2d 1264 (3d Cir. 1971); *United States* v. *Beard,* 414 F.2d 1014 (3d Cir. 1969).

amendment to the indictment, whether actual or constructive, is reversible error.

The purpose of the rule is to prohibit the indictment of the grand jury from becoming the indictment of the prosecutor or the court, thereby subjecting the defendant to conviction "on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. *United States* v. *Russell, supra; United States* v. *De Cavalcante, supra.* It must, therefore, be decided whether the verdict is based upon theories and evidence that were not fairly embraced in the charges made in the indictment. *United States* v. *Silverman*, 430 F.2d 106, 110 (2d Cir. 1970). The court does not find this abuse to have occurred in the instant case. As previously noted, there has never been a dispute as to the location of the goods at the time of the theft. Accordingly, there is no possibility that the defendant's conviction was based upon facts not presented to the grand jury. Moreover, the government's theory has remained essentially the same. It has consistently contended that a theft of goods from interstate commerce in violation of 18 U.S.C. § 659 occurred when the defendants removed the trailer and its contents from the lot at Lesher's. Unlike *Stirone* v. *United States, supra,* the defendant here has been convicted for the same acts charged in the indictment. In this case where the defendant has not been misled by the indictment, the conviction will not be reversed merely because this court has been led to the conclusion that the location of the truck containing the interstate shipment was not a facility enumerated in the act, as charged in the indictment, but that the truck itself was such a facility. *Cf, United States* v. *Petti,* 459 F.2d 294 (3d Cir. 1972). The court cannot hold that this is a modification in theory unembraced in the charges in the indictment and therefore sufficient to violate the fifth amendment.

II. Sufficiency of Evidence.

In regard to the motion for judgment of acquittal, the court approaches the evidence from a standpoint most favorable to the government, assuming the truth of the evidence offered by the government. *United States* v. *Stubin*, 446 F.2d 457, 460 (3d Cir. 1971). Applying this standard, the court must conclude that the government's evidence is sufficient to sustain the court's verdict.

However, by moving for a new trial the defendant is asking the court to reconsider its verdict and findings of fact in support thereof, contending that the judgment of conviction is not consistent with the weight of the evidence adduced at trial. On such a motion the court must reconsider all of the testimony introduced by both the government and the defendant and attempt to reassess the credibility of the witnesses. 2 *Wright, Federal Practice and Procedure*, Criminal § 553 (1969); *United States* v. *Joines*, 327 F.Supp. 253 (D.Del. 1971); *United States* v. *Morris*, 308 F.Supp. 1348 (E.D.Pa. 1970); *United States* v. *Hurley*, 281 F.Supp. 443 (D.Conn. 1968). The motion is addressed to the sound discretion of the trial judge and should be sparely granted only in those cases where "the evidence preponderates heavily against the verdict." *United States* v. *Leach*, 427 F.2d 1107 (1st Cir. 1970); *United States* v. *Pepe*, 209 F.Supp. 592 (D.Del. 1962), aff'd, 339 F.2d 264 (3d Cir. 1964).

As this case was tried before the court sitting without a jury, the court has had prior occasion to carefully weigh the evidence and consider the credibility of the witnesses. Upon doing so this court adjudged the defendant guilty beyond a reasonable doubt of aiding and abetting a violation of 18 U.S.C. § 659. Having reevaluated the record of this proceeding, the court cannot conclude that "the evidence preponderates heavily against the verdict" and reaffirms its judgment of conviction.

Ruggiero's involvement in this criminal enterprise was, admittedly, the subject of a serious factual dispute. The defendant has denied any participation whatsoever in any criminal acts. He testified that he drove to Lebanon, Pennsylvania, with co-defendant Rini on Sunday, June 20, 1971. He allegedly met Rini, an acquaintance of some duration, in a New York City bar on the night before the hijacking. He told Rini that he was having domestic problems and that his wife had left to stay with a relative in the Poconos. Ruggiero wanted to travel to the Poconos to persuade his wife to return to New York with him. However, because Ruggiero was subject to New York State probation and did not have a driver's license, he was hesitant to drive outside the State. Upon hearing this, Rini told Ruggiero that he had to go to Lebanon, Pennsylvania, the following day on personal business and suggested that Ruggiero accompany him to Lebanon. Rini told Ruggiero that Lebanon was only a short distance from his destination in the Poconos. Because Ruggiero was unfamiliar with Pennsylvania and because he was afraid to drive outside the State of New York, Ruggiero agreed to accompany Rini in an automobile borrowed by Ruggiero from Ruggiero's cousin. While in Lebanon Ruggiero asserts that he was completely ignorant of what his co-defendants were doing. He denied ever having seen defendants Farley and Flammia before the day of the hijacking. Several times Rini told Ruggiero that his business activity would be of short duration and suggested that he might accompany Ruggiero to the Poconos if Ruggiero would wait for him. Finally, shortly after midnight, Ruggiero having become impatient, decided to leave by himself. He, by coincidence only, pulled out of the motel directly behind the stolen truck driven by Rini. He had traveled several blocks when he was stopped and arrested by the FBI.

The key factual dispute arises in regard to a conversation which allegedly occurred between the government's chief witness, Robert Bush, and Ruggiero. According to

Bush, the conversation took place at Pushnik's Motel in Lebanon after defendant Farley's futile attempts to start the truck. Bush testified that he was escorted to a motel room where he spoke to Ruggiero for the first and only time that evening. Ruggiero told Bush that although he wished to remain in the background, Farley's inability to start the truck made it necessary for the defendants to ask for Bush's assistance. Ruggiero labeled himself as the "back-up man" who would follow the truck to New York. He offered Bush extra money if he would help. Ruggiero and Farley both testified that this conversation never occurred.

In rendering its verdict, as apparent from the court's findings of fact, the court chose to believe the testimony of Bush as it related to the occurrence of this conversation. The issue now before the court, however, is whether the "evidence preponderates heavily" against the court's decision to believe Bush's testimony and unless Bush's testimony in regard to the Ruggiero conversation is subject to serious impeachment, the verdict must be sustained. If the court's finding as to the occurrence of this conversation is sustained, Ruggiero's guilt as an aider and abetter has been established.

Initially, although not directly relevant to the issue of whether the court could reasonably conclude that the conversation between Ruggiero and Bush in fact occurred, the court finds Ruggiero and Bush in fact occcurred, the court finds Ruggiero's explanation of his presence in Lebanon unworthy of belief. Ruggiero's asserted reason for traveling to Lebanon, Pennsylvania, with Rini was that his parole restrictions prohibited his *driving* outside of the State of New York. Actually, the restrictions of his parole prohibited his leaving the State of New York in any fashion, so that by traveling with Rini to Lebanon, Pennsylvania, he violated the conditions of his parole, irrespective of who was driving the car. If it could reasonably be assumed that Ruggiero was concerned about driving outside the State

of New York, a cursory inspection of a road map would have indicated that he would be farther from his destination in the Poconos when he arrived at Lebanon, Pennsylvania, than prior to his departure from New York City. Moreover, it is an incredible circumstance that Ruggiero chose to depart Lebanon for the Poconos without the aid of Rini, at the exact moment the stolen truck *with Rini at the wheel* passed by Pushnik's Motel. Ruggiero, allegedly unaware that any of the prior events of the evening had transpired, pulled out of the motel parking lot almost directly behind the truck and follow it for several blocks before being arrested.

Other testimony of Bush linking Ruggiero to the theft of the truck places Ruggiero in his Oldsmobile talking to Rini and Flammia at the Lebanon Interchange of the Pennsylvania Turnpike before proceeding to Lesher Macks and Pushnik's; following in the Oldsmobile to Lesher Macks, turning around and proceeding to Pushnik's; entering Pushnik's Motel with Rini; driving past Lesher Macks while Farley, Bush and Rini were attempting to get a new truck to replace the burned out one; picking Bush up in the Oldsmobile and taking him back to Pushnik's after a new truck was secured.

Additionally, FBI Agents Pape and Page testified to seeing Ruggiero with Flammia, Bush, Rini and Farley talking together in Pushnik's lot. Another officer testified to seeing Ruggiero parked in his Oldsmobile near Lesher Macks, then going to Pushnik's. FBI Special Agent Wald saw Ruggiero in the Oldsmobile drive to and stop at Lesher Macks and then move on.

Subsequent to oral argument on the within motions, defense counsel has attempted to supplement the record with a number of affidavits corroborating Ruggiero's testimony concerning the presence of his wife in the Poconos on the date of the hijacking, and his attempts to obtain the use of an automobile for the asserted purpose of bringing her

back to New York City. We have carefully considered the content of these affidavits and assuming the propriety of their presentation at this time, the court finds that they do not warrant the receipt of further testimony and certainly do not establish the invalidity of the court's verdict. In order to disbelieve the critical portion of Ruggiero's testimony it is not essential that we disbelieve its collateral aspects. The affidavits submitted to this court fall far short of establishing the credibility of Ruggiero's denial of involvement in the hijacking. The affidavits do not affect the circumstances upon which the court has heretofore concluded that Ruggiero's testimony in relevant part was not worthy of belief.

When initially testifying about his conversation with Ruggiero, Bush stated that he could not distinguish Ruggiero from William Rini, the defendant who was found to be driving the truck. In other words, Bush was confused as to whether it was Ruggiero or Rini with whom he met in the motel room. After a short recess during which the witness reflected upon the physical characteristics of Ruggiero, he unequivocally identified Ruggiero as the individual with whom he conversed in the motel room and Rini as the driver of the truck. This subsequent identification remained intact through vigorous cross-examination by defense counsel.

Although going to the weight of Bush's testimony this initial equivocation does not seriously impeach the subsequent testimony. As the court interprets Bush's testimony, his initial confusion involved the respective roles of Ruggiero and Rini. Bush never hesitated to state that this conversation occurred with the individual who was driving the Oldsmobile; he did hesitate to identify Ruggiero as the driver of the Oldsmobile or the driver of the truck. Defense counsel through cross-examination attempted to ascertain whether this conversation could have occurred with Rini even though Bush prior thereto identified Rini as the driver

of the truck. Bush throughout his testimony consistently asserted that the conversation occurred with a fourth individual, and after initial hesitancy identified that fourth individual as Ruggiero.

The defendant also argues that Bush's testimony was seriously impeached by the testimony of the FBI agents and local police officers who were sureilling Pushnik's Motel on the evening of June 20, 1971. None of these witnesses testified that they saw Bush enter the motel room during the duration of their surveillance. The defendant contends, by negative implication, that if no police officer saw Bush enter the motel room, the alleged conversation did not occur. This argument would be of considerable weight if the police surveillance at the motel had been uninterrupted. However, there were sufficient interruptions in the surveillance at the motel to create the likelihood that the conversation took place without detection.

Bush testified that immediately after his conversation with Ruggiero, he, Farley and Rini returned to Lesher Macks where they proceeded to exchange tractors. Special Agent Metcalf who was in charge of the surveillance at Lesher Macks fixed this time as approximately 12:10 A.M., on June 21st. Special Agents Pape and Page testified that they began their surveillance at Pushnik's Motel at approximately 10:40 P.M., whereupon they observed Bush and the *four* defendants standing in the motel parking lot. Thereafter, Bush, Farley and Rini left in Bush's automobile. The agents remained about 25 minutes and then left to take up further surveillance at Lesher Macks. Bush, Farley and Rini did not return before Agents Pape and Page adjourned their surveillance at approximately 11:30 P.M. Agent Metcalf testified that the defendants began to exchange tractors shortly after Midnight. Therefore, the conversation between Ruggiero and Bush would have had to occur after Agents Pape and Page adjourned their surveillance at the motel.

Officer Tompkins of a local police department had also surveilled Pushnik's Motel. His car was parked approximately one block away. Although he saw a number of individuals going into and out of one of the motel rooms, from his vantage point he could only recognize an individual wearing a bright orange shirt; later shown to be Rini. The witness was unsure of the times involved and was too far away from the motel to observe all of the activity which occurred.

In the court's estimation, the conflict between the testimony of Bush and Ruggiero turned entirely on the credibility of the witnesses, a function exclusively for the trier of fact. The court does not find that Bush's testimony was impeached to the degree that a verdict based upon it could not withstand a motion for a new trial on the ground that the weight of the evidence does not support the judgment of conviction.

III. Entrapment.

The Third Circuit Court of Appeals has not decided the issue of whether a defendant may rely upon the defense of entrapment if he has also unequivocally denied the commission of the criminal acts charged in the indictment. The concensus of other circuits is that denial of the acts constituting the offense charged is inconsistent with the defense of entrapment which is in the nature of a confession and avoidance.[9] Accordingly, a defendant who denies his in-

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[9] *United States* v. *Rodrigues*, 433 F.2d 760 (1st Cir. 1970), *cert. denied*, 401 U.S. 943 (1971); *Sylvia* v. *United States*, 312 F.2d 145, 147 (1st Cir. 1963), *cert. denied*, 374 U.S. 809 (1963); *United States* v. *Pickle*, 424 F.2d 528 (5th Cir. 1970); *Harris* v. *United States*, 400 F.2d 264 (5th Cir. 1968); *Marko* v. *United States*, 314 F.2d 595 (5th Cir. 1965); *McCarthy* v. *United States*, 379 F.2d 285 (5th Cir. 1967); *United States* v. *Shameia*, 464 F.2d 629, 631 (6th Cir. 1972); *Burris* v. *United States*, 430 F.2d 399 (7th Cir. 1970), *cert. denied*, 401 U.S. 921; *United States* v. *Johnston*, 426 F.2d 112 (7th Cir. 1970); *United States* v. *Rodriquez*, 446 F.2d

volvement in the crime is ordinarily precluded from also alleging that if he did commit the crime he was entrapped. In the instant case Ruggiero chose to testify that he was not involved in the theft and was unaware of the reason for his co-defendants' presence in Lebanon, Pennsylvania, on the evening of the offense. In the court's opinion it is clearly inconsistent for the defendant to now contend that he was involved in the criminal enterprise but was impermissibly induced to participate by the overreaching of individuals acting on the part of the government.[10] Nonetheless, if, as Ruggiero contends, the government's evidence establishes the existence of entrapment *as a matter of law,*

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859 (9th Cir. 1971), *cert. denied,* 404 U.S. 1021; *United States* v. *Mehciz,* 437 F.2d 145 (9th Cir. 1971); *Ortega* v. *United States,* 348 F.2d 874 (9th Cir. 1965); *United States* v. *Gibson,* 446 F.2d 719 (10th Cir. 1971); *Munroe* v. *United States,* 424 F.2d 243 (10th Cir. 1970); *Martinez* v. *United States,* 373 F.2d 810 (10th Cir. 1967); *but see, United States* v. *Neuman,* 436 F.2d 285 (D.C.Cir. 1970); *Hansford* v. *United,* 303 F.2d 219 (D.C.Cir. 1962).

[10] The instant case in which the defendant has denied every act necessary to constitute the offense must be distinguished from cases in which the defendant admits only certain of the elements or acts involved in the crime but contends that although his acts are insufficient to sustain his guilt, he acted as a result of entrapment. As to the latter situation, entrapment may be raised because proof of one defense does not necessarily disprove the other. Accordingly, it has been held that in conspiracy cases a defendant may deny being a party to the conspiracy and still defend on the ground that overt acts he committed were done as a consequence of entrapment. *See, Henderson* v. *United States,* 237 F.2d 169 (5th Cir. 1956); *Sears* v. *United States,* 343 F.2d 139 (5th Cir. 1965); *United States* v. *Harrell,* 436 F.2d 606 (5th Cir. 1970).

It is also consistent for a defendant to contend that he was induced to deliver narcotics to governmental agents and also contend that he acted solely as a procuring agent, or did not know the nature of the substance delivered. *See, United States* v. *Rodrigues,* 433 F.2d 760 (1st Cir. 1970); *United States* v. *Baker,* 373 F.2d 28 (6th Cir. 1967); *United States* v. *Smith,* 407 F.2d 202 (5th Cir. 1969).

this court believes that the defendant should be entitled to raise that issue in support of a motion for judgment of acquittal. *See, Sendejas* v. *United States,* 428 F.2d 1040 (9th Cir. 1970), *cert. denied,* 400 U.S. 879; *United States* v. *Ward,* 360 F.2d 909 (7th Cir. 1966); *Sears* v. *United States,* 343 F.2d 139 (5th Cir. 1965). The issue, however, must be decided adversely to the defendant.

With the Supreme Court's reversal of the Ninth Circuit Court of Appeal's decision in *Russell* v. *United States,* 459 F.2d 671 (9th Cir. 1972), rev'd, 411 U.S. 423, (No. 71-1585, decided April 24, 1973), the defendant has lost his most cogent argument.

In *Russell* the Ninth Circuit extended the defense of entrapment as previously defined by the Supreme Court in *Sherman* v. *United States,* 356 U.S. 369 (1958), and *Sorrells* v. *United States,* 287 U.S. 435 (1932) to preclude conviction for criminal acts in which the government participated to "an intolerable degree" regardless of whether the defendant entertained a predisposition to commit the crime. The majority of the Supreme Court, however, in reversing the Ninth Circuit has refused to extend the defense of entrapment beyond its traditionally defined limitations, stating:

> "We are content to leave the matter where it was left by the Court in *Sherman:*
>
> 'The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 356 U.S., at 372, quoting *Sorrells* v. *United States, supra,* 287 U.S., at 442.' " (411 U.S. at 434-435).

It is thus clear to this court that the absence of criminal predisposition on the part of the defendant continues to be an essential element of the defense of entrapment. The defense focuses not on the acts of the government or its agents but on the intent or predisposition of the defendant to commit the crime.[11]

The court does not find that Ruggiero or his co-defendants were "entrapped" as the defense is defined in *Sorrells, Sherman* and *Russell*.[12] Moreover, in addition to his denial of the crime charged, Ruggiero is faced with another serious hurdle. There is nothing in the record indicating the circumstances under which Ruggiero may have become involved in this crime. Bush, the government informant, testified that he had never seen nor spoken to Ruggiero before June 20, 1971, the date of the hijacking. During the planning stages of the theft all conversations occurred between Bush and Farley, Flammia and Rini. Not only does the record reveal that Ruggiero did not have any direct contact with Bush before the date of the hijacking, but the court would have to surmise that Farley, Flammia or Rini

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[11] The Third Circuit has never departed from the traditional definition of entrapment. Most recently in *Lemons* v. *United States*, 470 F.2d 135, 137 (3d Cir. 1972), it was held: "[A]n illegal entrapment as a matter of law is not made out when the evidence is 'sufficient to establish that the defendant was ready, willing and able to commit the crime and was not corrupted by any overreaching activity of the agents.' *United States* v. *Crippen*, 459 F.2d 1387, 1389 (3d Cir. 1972)."

[12] The government has raised the issue of whether Robert Bush can be considered an agent of the government for the purpose of raising the defense of entrapment. This court does not find it necessary to decide that Bush has acted pursuant to a prearranged agreement with the government and thus under its power and control. Bush's status here is analogous to that of the informant in *Sherman, supra*, who had been a prior informant and who although acting in regard to Sherman without the knowledge or consent of the government, did so with the intention of aiding the government and not solely for private reasons.

conveyed Bush's remarks to Ruggiero before we could conclude that Ruggiero might have been indirectly induced by the acts of Bush. Were such a conclusion warranted it is still unclear whether Ruggiero can raise the defense of entrapment without a record sufficient to establish that he had any contact with the alleged government agent.[13]

In any event, the court can conclude with certainty that the government's evidence does not establish the defense of entrapment in favor of Ruggiero as a matter of law. Assuming, *arguendo,* Ruggiero can raise the defense of entrapment even though he cannot contend to have been directly induced by Bush, under the present record it would be incongruous to find that Ruggiero was entrapped without first concluding that his co-defendants were entrapped. If the defense fails as to the latter it must fail as to the former.

The testimony of Bush clearly establishes that the criminal design originated with Ruggiero's co-defendants and not with Bush. Bush's first contact with defendant Farley occurred when Farley approached Bush at a service station on Long Island, New York, and inquired as to whether Bush would allow Farley to steal a truckload of automobile batteries assigned to Bush for delivery in New York. Thereafter, Farley contacted Bush several times at Bush's

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[13] The Ninth Circuit has promulgated a policy prohibiting defendants from raisng the defense of entrapment unless they were personally induced to commit the crime by a government agent. Thus, one defendant cannot seek shelter under the defense of entrapment claimed by another. *See, e.g., United States* v. *Gonzales,* 461 F.2d 1000 (9th Cir. 1972); *United States* v. *Azadian,* 436 F.2d 81 (9th Cir. 1971); *Carbajal-Portillo* v. *United States,* 396 F.2d 944 (9th Cir. 1968). In these cases the defendants who sought to invoke the defense of entrapment were aiders and abetters who expressed a willingness to go forward that was not affected by the circumstances under which the principals were entrapped. The court in each case concluded that the government agent played no part in inducing the defendant's crime.

home in Delaware, asking Bush if he could point out truckloads of commodities which could be stolen while in transit. After several months of frequent requests by Farley, Bush capitulated by telling Farley he would point out a truckload of Bulova Acutron watches. Although the prospect of obtaining a large number of Acutron watches must have been well received by the defendants, the court cannot conclude that Bush's false representations as to the nature of the cargo were the source of the defendant's criminal design or needed to induce the criminal act. *Compare, United States* v. *Klosterman,* 248 F.2d 191 (3d Cir. 1957). The defendants had previously manifested an unsolicited predisposition to steal cargo valued at much less than Acutron watches. The only reason the defendants' previous inquiries did not consummate in actual thefts was Bush's inability or unwillingness to acquire access to the requested commodities. The defendants were ready and willing to engage in theft from interstate commerce. In our estimation, Bush's conduct did nothing more than afford the defendants an opportunity "for the continuation of a course of criminal conduct upon which they had earlier voluntarily embarked." *Lopez* v. *United States,* 373 U.S. 427, 436 (1963). That Bush's inducement may have seduced a hypothetical individual who was not so predisposed is not a relevant consideration. *United States* v. *Russell,* 411 U.S. at 434.

As the Supreme Court spoke in *Sherman, supra,* 356 U.S., at 372, "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." It is an inescapable conclusion that these defendants were "unwary". However, it is equally obvious that they were not innocent persons corrupted by the overreaching of governmental agents.

The Supreme Court, in *Russell,* did not rule out the possibility that a case may arise in which the conduct of law enforcement officers is so outrageous that considerations

of due process would preclude prosecution. In the instant case the record discloses that Bush played a more than passive role in the commission of this crime. In addition to disclosing the location of the truck, he provided aid to the defendants in removing the trailer and its contents from the parking lot. However, Bush's actions do not constitute "government involvement" to a degree greater than that in *Russell* and certainly do not rise to the level of violating "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment, *Russell, supra*, 411 U.S. at 432.

R. DIXON HERMAN
R. Dixon Herman
United States District Judge
Middle District of Pennsylvania

Dated: May 15, 1973.